APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

No. 95-0878

Crim. App. No. 30238

UNITED STATES,

Appellee

v.

MICHAEL J. GODSHALK, Staff Sergeant
U.S. Air Force,

Appellant

Argued May 23, 1996

Decided September 18, 1996

OPINION OF THE COURT

CRAWFORD, Judge:

Pursuant to his pleas, appellant was convicted at Osan Air Base, Republic of Korea, of wrongful appropriation (3 specifications), assault with a dangerous weapon, and kidnapping, in violation of Articles 121, 128, and 934, Uniform Code of Military Justice, 10 USC §§ 921, 928, and 934, respectively. Appellant was sentenced to a dishonorable discharge, 5 years' confinement, partial forfeitures, and reduction to the lowest enlisted grade. Pursuant to a pretrial agreement, the convening authority disapproved the forfeitures and reduced the confinement to 40 months, but otherwise approved the sentence. The Court of Criminal Appeals affirmed the findings and the

approved sentence in an unpublished opinion. We specified the following issue for review:

> WHETHER APPELLANT'S PLEAS OF GUILTY WERE INDUCED OR DID HE SUFFER ANY OTHER PREJUDICE AS A RESULT OF ANY VIOLATION OF HIS RIGHT TO COUNSEL. *See United States v. GREEN*, 5 USCMA 610, 18 CMR 234 (1955).

We hold that there was an express waiver of appellant's right to counsel. No evidence has been introduced of a disclosure of a confidential communication or prejudice to appellant.

FACTS

Suffering from marital problems leading to a state of depression and suicidal tendencies, appellant, on January 11, 1992, was admitted to the emergency room of a nearby military hospital. About 3½ days later, he was released from the hospital with a diagnosis of a mixed personality disorder (not considered to be a mental disease) with a recommendation for administrative discharge. Upon learning of this recommendation, he obtained a pistol and went to Staff Sergeant Hughes' apartment, shortly after midnight on January 16, 1992. There he confronted Hughes with a loaded pistol because of Hughes' relationship with appellant's wife. He told Hughes that they were going for a walk. He had Hughes get into a government van and, during a ride in the van, they had a long rambling conversation. After appellant released Hughes, he (Hughes) went to the quarters of a supervisor, Master Sergeant Hake, and told him what had happened. Hake called the squadron commander, who notified the Security Police. Appelant drove around aimlessly for about 2 days. During this time, he made numerous calls to Senior Master Sergeant Gulino, Chaplain Frick, and Captain Carmen J. Battle.

Appellant testified that, on January 17, 1992, he called Capt Battle, the area defense counsel at the installation.

Since she did not know anything about him, he told her to call Chaplain Frick or his commander.

Capt Battle talked to Chaplain Frick and learned that he had counseled appellant several times before and was aware of appellant's prior suicide attempts. When appellant called him on January 17 and said he was going to commit suicide, Chaplain Frick had this reaction:

> I was absolutely convinced that if he said that's what he was going to do, it was not a bluff. He may, at some point, change his mind and decide not to, but the sense I had was that he was not playing with me because the plan was clear and he answered every question I had very, very specifically.

Later when appellant called Capt Battle again, he was surprised at all the information she had obtained.

During negotiations, it became clear appellant intended to commit suicide. What appellant needed was help but was afraid of sitting in jail. Chaplain Frick described the process as follows:

> Well, that was a theme in our conversation over the phone on that Friday that I asked him, "Is there any circumstance under which you'd be willing to turn yourself in?" He said, "The only way I'll do that is that if I am assured that I'll be able to get the help I need. If I am just going to sit in a jail cell, I'd just as soon kill myself."
>
> So as things evolved throughout that day, and then later the next day, that continued to be a very strong concern of his, and I had the feeling that there was a sincere effort being made on the part of the person who was doing most of the negotiating to comply with that request. Whether she could—
>
> Q: Who was that person?
>
> A: That was Captain Battle.

Q: Okay.

A: Whether she could actually make it happen or not, I think most of us were aware of the fact that she probably didn't have that within her power, but, clearly, since that was his primary concern, there was a sincere effort to try and meet that concern and respond in a way that would get him to come in.

All the individuals appellant called joined in an effort to convince him to abandon his plan to commit suicide and get him to return to the base.

Capt Battle did not appear as a witness at trial but a stipulation of expected testimony indicated that she "was first contacted by [appellant] on or about 16 January 1992 by telephone" and spoke to appellant on numerous occasions between January 16 and 18, 1992. During these conversations, appellant had asked if the conversations were confidential because she was his attorney. She replied yes. But she said in reality that they were not confidential because she had been "instructed" by her supervisor to report this information to the Office of Special Investigations and the Security Police. In extenuation and mitigation, appellant asserted that Capt Battle had assured him he would face a maximum punishment of 6 months' to one year's confinement, and the confinement would be only after he had received treatment. Based on these conversations, he surrendered on January 18, 1992.

At trial, there were no motions concerning Capt Battle's conduct. Civilian defense counsel, Mr. Dan R. Hyatt, argued that appellant surrenderd himself based on Capt Battle's assurance. Upon inquiry by the judge, Mr. Hyatt stated that he was not arguing that appellant was denied counsel, but was contending that the Government should be held to the promises of proper mental health treatment held out by Capt Battle in her conversations with appellant. The following colloquy then ensued:

MJ: Well, but my point was that at least on the surface of it, there's a potential of your argument

being perceived, one, as a counsel not being provided and two, I'm hearing conversations about confidentially and I want to make sure that there's no claim by the defense that anything said by the accused to Captain Battle during the time period in question is something that's been used against him that you would feel you've got a motion—

CIV DC: [Mr. Hyatt]: We—

MJ: —for as well.

CIV DC: —expressly waived that, Your Honor, because we would have a potential Motion to Suppress. For instance the articles he surrendered at the time, and so forth. We expressly waived that on the record.

MJ: So, in other words, that's the concerns [sic] I have is, at least throught what you're saying, there's some potential for those kinds of motions, and I appreciate making sure that I understand your position—

CIV DC: Yes, sir.

MJ: —concerning that.

CIV DC: Yes, sir.

MJ: So, then, I guess I'll, you know, proceed on that, but what you're saying is, as I understand it, that your client basically surrendered himself based on his understanding of what would happen after he returned to military control?

CIV DC: Yes, sir, and that the Government—if Captain Battle is actually an agent for the Government—and by her own testimony she is—and she made some promises to him and he relies on those to his detriment, I would ask the court to enforce those promises. I think that, as a matter of fairness, this court should give very heavy consideration to enforcing those promises.

* * * *

I would ask the court however—I think that an appropriate duration of confinement for Staff Sergeant Godshalk, under all of the circumstances, may be two or three years, but I think that in view of the fact that Captain Battle made these promises for [sic] him, I would ask the court to very carefully consider mitigating the punishment sufficiently to enforce that promise and to incarcerate this individual for not more than 12 months because that's what Captain Battle told him that he would receive.

MJ: And that gets me to the last question. I'm sorry to have such a—

CIV DC: Yes, sir.

MJ: —conversation in your argument, but again, I want to make sure, and I feel somewhat comfortable with that, as a Navy reservist, you're aware that the court has no power to require medical treatment or any other type of treatment.

CIV DC: Yes, sir. I am, and what I would ask the court to do—the only way that the court could truly, specifically require specific performance of this agreement would be basically to give the accused no punishment and leave the convening authority to provide him with mental health treatment.

I'm not going to ask the court to do that. I'm going to ask the court to give the accused the benefit of the doubt with respect to the duration of the confinement because he understood that he would probably serve some confinement, or possibly serve some confinement.

With respect to the mental health treatment, I would ask the court for a very strong recommendation to the convening authority that the confinement be abated pending a period of mental health treatment sufficiently that he could withstand that psychically

> [sic], and Dr. Greene testified that he felt six months in-patient treatment would provide this accused with the tools that he could endure this confinement and the balance of coming out of confinement and recognizing, by his own words, that maybe he's going to end up working at Burger King or something.

As to the "equities of this case," the Court of Criminal Appeals saw "no egregious, outrageous conduct by the Government which violates the Fifth Amendment or otherwise might give rise to an exercise of this Court's supervisory powers to dispel any overriding appearance that a miscarriage of justice occurred." Further, the Court held that "Capt B [Carmen J. Battle, accused's former counsel]'s interaction with appellant had no impact on his trial, his Sixth Amendment right to effective assistance of counsel, or his ability to prepare a defense as guaranteed by the Fifth Amendment." Unpub. op. at 11.

Moreover, even appellant testified that Capt Battle made promises regarding a possible sentence of 6 months to a year. Finally, Chaplain Frick testified that almost everywhere Capt Battle told appellant was carefully qualified.

Appellant defense counsel argue that there was a conflict of interest that may not be waived. *See United States v. Collier,* 20 USMCA 261, 43 CMR 101 (1971); *United States v. Green,* 5 USCMA 610, 618, 18 CMR 234, 242 (1955). Final brief at 14.

The Government argues that appellant waived any issue concerning his right to counsel. Answer to Final Brief at 1. In any event, Capt Battle was seeking to help authorities to prevent appellant from committing suicide. "Divulging client confidences to prevent a client's suicide is within acceptable ethical standards of professional responsibility." *Id.*

DISCUSSION

Under the circumstances of this case, absent plain error, failure to move to suppress evidence, dismiss the charges, or grant other appropriate relief constitutes waiver. RCM 905(e) and Mil.R.Evid. 103(d), Manual for Courts-Martial, United States (1995 ed.). To constitute plain error appellant must demonstrate the error was "plain," "clear," or "obvious," and affected a substantial right of appellant. *United States v. Olano*, 507 U.S. 725, 734, 113 S.Ct. 1770, 1777-78 (1993); *United States v. Fisher*, 21 MJ 327 (CMA 1986). This Court will not hesitate to correct any error if it "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *United States v. Olano*, 507 U.S. at 736, 113 S.Ct. at 1779; *United States v. Fisher*, 21 MJ at 328.

This is not a case of dual roles being performed by defense counsel or outrageous conduct by the Government. Both Congress (Article 27, UCMJ, 10 USC § 827) and this Court has gone to great pains to ensure to servicemembers the right to counsel. This right to a lawyer appointed free of charge, *see, e.g., United States v. Acton*, 38 MJ 330 (CMA 1993), applies at the pretrial stage, *see e.g.*, Mil.R.Evid. 305(d)(1)(A), 305(e), 321(b)(2); trial stage, *see, e.g.*, Art. 27; post-trial stage and even the appellate stage, *see, e.g., United States v. Palenius*, 2 MJ 86 (CMA 1977). A concomitant right is the right to confidential communication between the attorney and client. Mil.R.Evid. 502. Any exception to this rule must ensure that there is no chilling effect on defendants' freely speaking with their military lawyers. *See Grady v. Darley*, 44 MJ 48 (Sum. disp. 1996). Thus, Mil.Ed.Evid. 502(a) provides for confidential communications "for the purpose of facilitating the rendition of professional legal services to the client." Mil.R.Evid. 502(d)(1) provides for an exception to confidentiality of communications between an attorney and client:

> *Crime or fraud.* If the communication clearly contemplated the future commission of a fraud or crime or if services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud[.]

This rule is reinforced by adoption of the ABA Model Rules of Professional Conduct by the Air Force.

ABA Model Rule of Professional Conduct 1.6 provides:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> > (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm[.]

The Air Force Rule of Professional Conduct 1.6(b)(1) was modified to provide an exception to the rule of confidentiality as follows:

> (1) . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or substantial impairment of national security or the readiness or capability of a military unit, vessel, aircraft or weapons system[.]

The ABA has issed an opinion providing that the rule of confidentiality does not attach to a "client's intention to commit suicide." ABA Committee on Ethics and Professional Responsibility, Informal Opinion No. 83-1500 (June 24, 1983). As with *Miranda v. Arizona,* 384

U.S. 434 (1966), there is a public-safety exception to privileged communications. *New York v. Quarles,* 467 U.S. 649 (1984). Clearly appellant told two individuals that he intended to kill himself. Thus, we hold that the imminent-death exception to the rule of confidentiality applies.

United States v. Green, 5 USCMA 610, 18 CMR 234 (1955), is clearly distinguishable. The defense counsel in *Green* worked in the Office of the Staff Judge Advocate and was legal adviser to appellant's special court-martial convening authority. After the Article 32, USMJ, 10 USC § 832, investigation, the SJA asked the defense counsel to prepare a memorandum to summarize the testimony "which would probably be offered against Green at his . . . trial." Eventually this memorandum was made available by the SJA to the trial counsel for use in the preparation of the prosecution's case. 5 USCMA at 612, 18 CMR at 236. As we said in *Green*:

> "This [attorney-client] privilege—one of the oldest and soundest known to the common law—exists for the purpose of providing a client with assurances that he may disclose all relevant facts to his attorney safe from fear that his confidences will return to haunt him." *United States v. Marrelli,* 4 USCMA 276, 15 CMR 276. Under the modern view, the privilege exists for the protection of the client—not the attorney—in enabling the former to communicate to his counsel information necessary for professional representation; and in general—and for obvious reasons—doubts must be resolved in favor of the inclusion of a doubtful communication within its folds. A lawyer is duty-bound not to divulge a client's confidences to the disadvantage of the latter. Canon 37, Canons of Professional Ethics of the American Bar Association. Although this proscription is applicable to representation in both civil and criminal matters, its place is particularly sure in the latter field, where

> conceivably a disloyal or irresponsible act by a defense attorney may, in one way or another, operate firmly to close the door of the penitentiary on his client, or even to forfeit his life.

5 USCMA at 612-13, 18 CMR at 236-37.

The present case does not involve a breach of the attorney-client privilege but rather it is a case where the attorney acted in her client's best interests to ensure that he surrendered and did not harm himself or others. No one at trial considered appellant deserted by his defense counsel or argued government interference with the relationship between appellant and his counsel. This might be a different case if the Government had attempted to introduce any conversations between appellant and Capt Battle. There is no evidence that Capt Battle turned over her notes to the Government to be used in obtaining a plea or acted disloyally or irresponsibly concerning appellant's interests.

The decision of the United States Air Force Court of Criminal Appeals is affirmed.

Chief Judge Cox, Judge SULLIVAN, and Senior Judge EVERETT concur.

GIERKE, Judge (dissenting).

I cannot join in condoning the Government's behavior. The majority apparently is not offended by Captain Battle's uncontradicted admission that she, acting on orders of her superiors, falsely assured Sergeant Godshalk that their "conversations were confidential and that [she] would represent him," when in fact she was acting as a government agent. In my view, this kind of outrageous conduct violates due process. If it is condoned, Air Force servicemembers will be justifiiably wary of confiding in Air Force defense counsel.

The majority analyzes this case in terms of disclosure of privileged information. That analysis is off the mark because Capt Battle was not Sgt Godshalk's lawyer. She was a government agent pretending to be his lawyer. The majority places great weight on the Government's good intentions. This case is not about good intentions, but about the means used to carry out those intentions. The majority asserts that Sgt Godshalk waived any objections arising from Capt Battle's behavior. My reading of the record is that his purported waiver extended only to evidentiary objections.

The majority states that appellant has produced no evidence that he was prejudiced by the Government's subterfuge. The majority has it backwards. Instead, this case should be treated like the cases involving use of immunized testimony. I would require the Government, not Sgt Godshalk, to produce clear and convincing evidence that the law enforcement investigation, decision to prosecute, governmental trial tactics, appellant's election to retain civilian counsel, and appellant's decision to plead guilty were untainted by the subterfuge. *See Kastigar v. United States,* 406 U.S. 441 (1972); *Cunningham v. Gilevich,* 36 MJ 94 (CMA 1992); *United States v. Boyd,* 27 MJ 82 (CMA 1988).

Without a remand for a full *Kastigar*-type hearing, the taint attached to this prosecution and the damage to the integrity of the Air Force's defense counsel structure cannot be purged. I cannot join in affirming Sgt Godshalk's conviction based on the record before us. Accordingly, I dissent.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF CRIMINAL APPEALS

ACM 30238

UNITED STATES

v.

Staff Sergeant MICHAEL J. GODSHALK, FR265-61-7365
United States Air Force

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9 May 1995

Sentence adjudged 11 June 1992 by GCM convened at Osan Air Base, Republic of Korea. Military Judge: Michael L. Kilroy (sitting alone).

Approved sentence: Dishonorable discharge, confinement for 40 months, and reduction to E-1.

Before

SNYDER, PEARSON, and SCHREIER

Appellate Military Judges

OPINION OF THE COURT

SNYDER, Senior Judge:

Tried by a military judge sitting as a general court-martial, appellant was convicted, pursuant to his pleas, of wrongful appropriation of a government 9mm semi-automatic pistol, ammunition, and a van; aggravated assault on Sergeanat (Sgt) H with the pistol; and kidnapping Sgt H. Articles 121, 128, and 134, UCMJ. He was sentenced to dishonorable discharge, confinement for 5 years, forfeiture of $285.00 pay per month for 60 months, and reduction to E-1. Pursuant to a pretrial agreement (PTA), the convening authority reduced the confinement to 40 months, disapproved the forfeitures, and otherwise approved the sentence.

Notwithstanding his negotiated pleas of guilty, appellant has submitted eight assignments of error, two of which have been resolved adversely to him by our supervisory courts while his case was still pending review. *See United States v. Weiss,* 36 M.J. 224 (C.M.A. 1992), *aff'd,* —— U.S. ——, 114 S. Ct. 752, 127 L. Ed. 1 (1994); *United States v. Graf,* 35 M.J. 450 (C.M.A. 1992), *cert. denied,* —— U.S. ——, 114 S. Ct. 917, 127 L. Ed. 2d 206 (1994). We find the remaining assignments of error unpersuasive, and we affirm.

In his remaining assignments of error, *inter alia,* appellant avers: 1) that the military judge abused his discretion by denying his request for an expert consultant and a continuance, both of which impeded his preparation for trial; 2) the government was estopped from trying him by court-martial because it abrogated the attorney-client privilege via foisting onto him a "government agent" as his defense counsel; and 3) his sentence is inappropriately severe.

To place this case in proper perspective, especially with regards to how the parties have joined issue on appeal, it

will be helpful to state up front that the central, underlying premise of the defense, at trial and before this Court, is that appellant's actions were not crimes but "cries for help," and the government reneged on its "promise" to help. This thesis colors the entire case. We also state up front that, after beginning review of this case with the scales heavily tilted in appellant's favor, the record leaves us convinced that appellant's actions were not desperate cries for help but manipulative acts to control his wife. Article 66(c), UCMJ.

I. FACTS

Appellant's responses to long-term martial discord led to his predictament. Although witnesses referred to an earlier "attempted suicide" by appellant during the 1980s as a result of his marital problems, the record does not reflect a firm medical diagnosis of an attempted suicide *vis a vis* a suicidal gesture. Dr. G, a clinical psychologist who testified in sentencing for the defense, testified appellant had either "an attempt or serious ideation" in 1986. Be that as it may, during the period in which these offenses, and his trial, occurred appellant was diagnosed as not suffering from any clinical mental disease or defect, but a personality disorder.

Sgt H lived in the same apartment complex in Osan, Republic of Korea, as appellant. In mid-September 1991, while a guest in appellant's home, Sgt H. was invited by appellant to have sex with appellant's wife. Appellant's rationale was that she was going to be unfaithful with someone, and he preferred it to be with someone he knew. Sgt H. declined the invitation and, the next day, reported it to his superiors, who were very familiar with appellant's marital difficulties. Sgt H. was instructed to steer clear of Mrs. Godshalk and the unit would handle it.

Later in the month, Mrs. Godshalk went to Sgt H's apartment. After bemoaning her marital problems and

having a dring, they engaged in sexual intercourse. Appellant unexpectedly returned home early and was there when she returned. She went and informed Sgt H. Five minutes later, appellant went to Sgt H's apartment and verbally accosted him. During the exchange, appellant knocked the door off its hinges, gave Sgt H $20.00, and told him not to stay in his apartment that evening. Appellant and his family moved 10 days later.

On 15 January 1992, without authority, appellant opened his weapons safe and removed a 9 mm pistol and 90 rounds of ammunition. He then wrongfully appropriated the unit's van and drove to an area near Sgt H's apartment. Shortly after midnight on 16 January 1992, Sgt. H answered a knock on his door. He found appellant with the loaded 9mm at his side, pointed downwards. Appellant told Sgt H to "get dressed, we are going for a walk. Do everything slow." Sgt H was not wearing a coat as they left in sub-freezing weather and walked to the van. Appellant detained Sgt H for two hours, during which, he demonstrated to Sgt H that the pistol was loaded and showed him three other loaded clips and a box of loose 9mm ammunition. During this sequence, appellant "forgave" Sgt H and decided not to harm him and, as the drama played itself out, Sgt H evolved from victim to concerned friend and tried to convince appellant not to do anything rash. Appellant released Sgt H unharmed near his apartment and departed for an unknown location.

After his release by appellant, Sgt H reported his ordeal to a superior noncommissioned officer who also lived in the complex, and he reported it to the unit commander.

While he was at-large 16-18 January 1992, appellant was in telephone contact with his unit chain of command. He was instructed on how to turn himself in at either Camp Humphreys or Osan Air Base. Appellant was also in telephone contact with Major (Chaplain) F, who had

been providing counselling to appellant. On 17 January 1992, appellant told him that after handling some details he planned to kill himself the next day. The "negotiating posture" appellant presented was that he would turn himself in only if he received the help he needed, appellant's definition of help being a maximum mental health inpatient treatment and, if he did not get it, he preferred suicide over sitting in a cell.

Based on his prior contacts with appellant, including appellant's showing him the scars from his claimed prior suicide attempt, Chaplain F was convinced appellant was not bluffing, but was quite serious. It was this genuine concern for appellant's life which provided the ingredients for the birth of the accusation of the most sinister conduct by the government: insertion of a "government agent" into the role of area defense counsel.

In addition to telephoning Chaplain F, appellant also initiated telephone contact with the Osan area defense counsel, Captain (Capt) B. Appellant provided no details of his offenses, but referred her to others who could give her information on his offenses, and said he would call again later. During the telephone conversations between them, Capt B assured appellant their conversations were confidential and that she would represent him. Although there was occasion when Captain B was behind closed doors while talking with appellant, there were other occasions when in fact at least Chaplain F, and possibly others, was present and hearing her end of the conversation. It is only through Chaplain F's, and appellant's sworn testimony in sentencing, that the record provides its glimpses into this scenario.

After gathering information on appellant's offenses from persons other than appellant, Capt B was again called by appellant. At some point in time unbeknownst to appellant, it was determined that priority should be given to luring appellant into surrendering to prevent his feared

suicide, and that Capt B was the ideal intermediary to accomplish that goal. The record is silent on who made this determination. In pursuit of this end, Capt B told appellant he could trust her and no one else, that he would get full treatment *prior to his trial,* either at Wilford Hall in Texas, or in Hawaii, and that she would even go with him. She also offered to come alone to wherever he was calling from. Appellant also testified that she told him she would be present when he surrendered. We will detail the other critical part of their conversation in our discussion of sentence severity.

Captain B did not testfy at trial, the parties instead agreeing to a cryptic stipulation of expected testimony, wherein this sentence closes the stipulation:

> In fact, our conversations were not confidential because I had been instructed by my boss that I was to act as a government agent and coordinate my actions with the Office of Special Investigations and the Security Police.

For readers unfamiliar with the Air Force's structure, all defense counsel are in an entirely separate chain of command which is not subject to the commander or command structure of the base where they may be physically located. Capt G's "boss" was the Chief Circuit Defense Counsel, or his designee, for the then Seventh Circuit (now the Pacific Circuit), whose office was at Yokota Air Base, Japan. Accordingly, no one outside the Air Force's Defense Services' structure would have had the authority to give Capt B the instruction to which the stipulation refers.

II. DISCUSSION

Before discussing the legal consequences of these facts, we point out that, during oral argument of this case, civilian appellate defense counsel conceded that ineffective assistance of counsel at the trial level is not an issue.

Indeed, appellate defense counsel agree that appellant received "excellent representation" by his civilian and military defense counsel, as indicated by the noted absence of complaint by appellant. Further, appellate defense counsel also agreed that a limited fact finding hearing pursuant to *United States v. DuBay,* 17 U.S.C.M.A. 147, 37 C.M.R. 411 (1967), to develop more facts concerning what Capt B did or did not do, would not be helpful in the instant case.

As a result of appellant's provident pleas of guilty and *affimative tactical* waivers at trial, appellate defense counsel essentially asserts a claim of denial of due process as a result of the military judge's denial of the consultant and the continuance. At oral argument, appellate defense counsel averred that even the PTA was a direct result of appellant's counsel being so strapped by the denial of a continuance that they had no choice but to negotiate the PTA. There is no basis in fact, evidence, or logic for this averment. The record is replete with knowing affirmative waiver of all of these issues.

A. Military Judge's Abuse of Discretion

On 26 May 1992, trial defense counsel requested the convening authority appoint a Dr. Rabkin, of the University of Washington, as an expert consultant at government expense to assist in its preparation for trial, specifically in the area of diminished capacity. The convening authority denied the request. Defense counsel renewed the request before the military judge via motion for appropriate relief. The military judge denied the motion on 4 June 1992, citing the failure of the defense to adequately demonstrate a need for the consultant.

Points alluded to by the military judge as persuasive were: 1) On 7 April 1992, the military judge, pursuant to a defense request, directed the appellant be examined by a board of officers to determine appellant's mental responsibility, and one of the board's findings was contrary to

the defense's assertion that appellant was suicidal; 2) the report, dated 16 April 1992, was in the defense's possession when it requested Dr. Rabkin, but the defense did not proffer any specific theory or opinion of Dr. Rabkin which may have contradicted the conclusion of the board.

The standard of review for this issue normally is abuse of discretion. *United States v. Garries,* 22 M.J. 288 (C.M.A. 1986). In light of appellant's provident pleas of guilty, however, we conclude that we need not address the merits of this averment, as his pleas waived the issue.

A plea of guilty waives any objection, whether or not previously waived, to the extent the objection relates to the factual issue of guilt of the offenses to which appellant pleaded guilty. Rule for Courts-Martial (R.C.M.) 910(j).

Our review of trial defense counsel's motion for appropriate relief, and civilian defense counsel's affidavit, which was attached thereto, unambiguously restricted their claimed need for Dr. Rabkin to the issue of diminished capacity as it related to appellant's guilt or innocence of the specific intent offenses. There is no mention in either document of any necessity or desire to have Dr. Rabkin testify on matters which may have impacted sentence. Further, the defense did not renew the request at trial for Dr. Rabkin on the basis of assisting with sentence, and medical testimony was provided on sentencing through Dr. G, a governmet psychologist who examined appellant on 23 January 1992. Therefore, the matter is waived. R.C.M. 910(j); *United States v. Langston,* 32 M.J. 894 (A.F.C.M.R. 1991); *United States v Sneed,* 32 M.J. 537 (A.F.C.M.R. 1991); *see also United States v. Tornowski,* 29 M.J. 578 (A.F.C.M.R. 1989).

In the motion for appropriate relief requesting Dr. Rabkin, trial defense counsel also requested an additional delay to 1 July 1992, regardless of the military judge's ruling on the request for Dr. Rabkin. The key language

in the motion is military defense counsel's statement that "If this motion is denied in its entirety, defense counsel *may wish* to obtain expert assistance at the accused's expense." (Emphasis added)

The only other information relating to the request for additional delay is contained in the military judge's ruling in Court Order No. 2, issued 4 June 1992, wherein he references a R.C.M. 802 conference where defense counsel stated the additional delay was needed to formulate "three potential evidentiary motions" which became apparent during lead counsel's preparation during the week of 25 May 1992. The military judge denied the delay, ruling that additional time was not needed to formulate the motions the defense indicated it was formulating. Unfortunately, the military judge did not enter detailed essential findings or require a chronology be made part of the record. As a result, we have had to glean information from different parts of the record, primarily from the pleadings of counsel for both sides.

The charges were served on appellant on 24 March 1992. The psychiatric evaluation requested by the defense on 6 April 1992 was completed and the report published on 16 April 1992. An initial trial date of 30 April 1992 was set. On 21 April 1992, the defense requested a delay until 8 June 1992, which apparently was granted, as the trial did not convene until 10 June 1992.

Although the trial counsel referenced the prior delay granted the defense and the impact an additional delay would have on witnesses due to depart Osan Air Base within the next 30 days, the military judge did not reference or weigh any of those factors. He denied the delay on the basis of his assessment of the motions the defense desired to make, whatever they may have been.

Whether to grant a continuance to either party is an area where the military judge's discretion is very broad. Only "a myopic insistence upon expeditiousness in the face

of a justifiable need for delay" will constitute an abuse of discretion. *United States v. Thomas*, 22 M.J. 57 (C.M.A. 1986); *United States v. Menoken*, 14 M.J. 10 (C.M.A. 1982); *see also Morris v. Slappy*, 461 U.S. 1 (1983); *Ungar v. Sarafite*, 376 U.S. 575 (1964).

As indicated above, because the military judge was less than meticulous in insuring all salient matters were included in the record, this is not an ideal record for which to test for an abuse of discretion. *See Evans v. Kilroy*, 33 M.J. 730, 731 (A.F.C.M.R. 1991) (military judge should make and enter precise findings and conclusions). Nonetheless, the record is quite clear in other respects that appellant waived any objection he may have had as a result of the denial of the delay.

First, as emphasized above, trial defense counsel only indicated the possibility of appellant retaining an expert consultant at his own expense. They did not specifically inform the military judge of a firm commitment to do so or request time to accomplish it. *See United States v. Burnette*, 29 M.J. 473 (C.M.A. 1990), *cert. denied*. 498 U.S. 821, 111 S. Ct. 70, 112 L. Ed. 2d 43 (1990) (military judge denied request for consultant, but advised defense to "keep him posted;" defense failure to renew request waived issue). Second, civilian trial defense counsel agreed with the military judge's summation of the 3 June 1992 telephone R.C.M. 802 conference wherein he described the potential motions as evidentiary motions and did not renew the request at the initial Article 39(a), UCMJ, session on 10 June 1992. Third, the defense did not make any evidentiary motions during sentencing. In fact, during argument on sentence, civilian trial defense counsel specifically stated the defense made a tactical decision not to pursue any motions to suppress, no doubt the result of appellant's decision to seek a PTA. All of these factors point clearly to the conclusion that the potential motions dealt solely with issues relating to findings on guilt or innocence.

In view of appellant's failure to definitively inform the military judge he would hire a consultant at personal expense, and his provident pleas of guilty, we conclude any issue regarding the requested delay until 1 July 1992 was forfeited. R.C.M. 910(j). We disagree with civilian appellate defense counsel that the PTA itself was the result of the defense being hamstrung by the denial of the delay. Such a hypothesis is not supported by the record. During the interim of 4 to 10 June 1992, the defense had more than adequate time to pursue the potential motions and, *based on its efforts and research to that point,* request the military judge to reconsider his ruling. Therefore, we find no plain error. *United States v. Olano,* —— U.S. ——, 113 S. Ct. 1770 (1993); *United States v. Causey,* 37 M.J. 308, 311 (C.M.A. 1993); *United States v. Fisher,* 21 M.J. 327, 328 (C.M.A. 1986).

B. Impact of Capain B's Involvement

Appellant asserts that, because Capt B was acting as a agent for the government, she should have advised him of his Article 31(b), UCMJ, rights prior to their conversations. We find there is no issue with regards to this assertion because of affirmative waiver.

C. Captain B's Actions and Sentence Severity

We combine appellant's assertion that, because it abrogated the attorney-client relationship by using confidential information obtained from appellant, the government was estopped from trying appellant with the assertion that, because it is overly harsh and exceeded the sentence Cap B "promised" appellant, the sentence is unduly severe. We disagree with both of these claims.

During oral argument, civilian appellate defense counsel requested we set aside the findings and sentence primarily because of the appearance surrounding Capt B's actions. Considering the affirmative tactical waivers by the defense at the trial level, this essentially is a request

that we act pursuant to our supervisory powers. A thorough reading of the record reflects that certain terms and labels outstrip the reality of events.

Let us first consider what "promises" or "deceptions" Capt B allegedly committed. As stated earlier in this opinion, this situation developed because of genuine concern for appellant's life. Other than appellant's testimony in sentencing, the only insight we have into the situation is through Chaplain F, whose testimony on behalf of appellant included the following:

> A: I asked him, "is there any circumstance under which you'd be willing to turn yourself in?" He said, "The only way I'll do that is that if I am assured that I'll be able to get the help I need. If I'm just going to sit in a jail cell, I'd just as soon kill myself." . . . I had the feeling that there was a sincere effort being made on the part of [Capt B], who was doing most of the negotiating, to comply with that request.
>
> Whether she could actually make it happen or not, I *think most of us were aware of the fact that she probably didn't have that within her power.*
>
> Q: And then with respect to that conversation that you heard her half of it. It was pretty clear to you that she was, in fact, promising that if he came in he would receive mental health treatment?
>
> A: Well, that's a hard question for me to answer because the tension at that moment was what is she able to say to him—in my mind, what is she able to say to him that she has within her power to have happen, and to what extent is [Capt B] going to be the person who's pivotal in him coming in or not, *and then do you just say whatever it takes to get him to come in?*
>
> *There were lots of qualifiers in her responses,* but I guess I'm comfortable saying, for the most part,

> yes. I do feel like she believed that a very sincere effort would be made to try and get him the help that he was requesting, and would do whatever she could to enable that process.

(Emphasis added).

Appellant provided sworn testimony during the sentencing portion of the trial. During his direct testimony, he provided the following:

> Q: Staff Sergeant Godshalk, what, if anything, did Capt [B] tell you about a maximum punishment, if any, that you would receive?
>
> A: I told her all the things that I had done. She pulled out the Manual and she went through it. She came up with a few months here, a few months there. The most she'd come up with anything at any one point was six months. She did mention kidnapping. She said that was very serious, but she said because I didn't touch him, I didn't hurt him—she listed off a lot of things. . . . *She came up with between six months and a year would be the max, and that was only after I'd had treatment, and that was only if they deemed, after treatment, that I should go to court-martial.*

(Emphasis added)

Appellant also testified that, notwithstanding Capt B's entreaties and her promises, he told her he'd call her back. After he calling his parents, he informed Capt B he was surrendering. Appellant never told Capt B his whereabouts. He appeared at one of the gates of Osan Air Base, where he was apprehended. Later, Capt B informed him that she had to withdraw from representing him because she might be called as a witness for the prosecution. She confirmed their conversation and her withdrawal in a letter.

Capt B's letter to appellant confirming their earlier conversation is the only statement in the record personally

prepared by Capt B. She did not use the term "government agent" anywhere in her letter. That term or description does not appear until the stipulation of her expected testimony mentioned earlier.

It was during civilian trial defense counsel's closing argument, however, that the clarity of the waivers involved crystallized. When counsel broached the averment of Capt B promising appellant confidentiality while acting as an "agent of the government," the following dialogue occurred between civilian counsel and the military judge:

> MJ: Counsel, I need to stop you right here. Are you using your argument making a claim that he was denied the counsel that he sought, because we haven't had that expressed at this point.
>
> A: Your Honor, I would not go quite that far. . . . Let me be very candid with the court. *I did a fair amount of research on this issue.* I'm not sure that it was a critical stage of the proceedings. . . . [W]hether or not Captain [B] could have bound the government by her promises, I'm not going to say that . . . .
>
> MJ: Well, but my point was that at least on the surface of it, there's a potential of your argument being perceived, one, as a counsel not being provided and, two, I'm hearing conversations about confidentality, and I want to make sure that there's being no claim by the defense that anything said by the accused to Captain [B] during the time period in question is something that's been used against him that you would feel you've got a motion for as well.
>
> A: *We expressly waived that, your honor,* because we would have a potential Motion to Suppress. For instance, the articles that he surrendered at the time, and so forth. *We expressly waived that on the record.*

M.J.: So, in other words, that's the concerns I have is, at least through what you're saying, there's some potential for those kinds of motions, and I appreciate making sure that I understand your position concerning that.

* * * *

A: [What Captain B did from an ethical perspective] is not proper, but that's not a matter for this court to concern itself with.

(Emphasis added).

Civilian counsel then argued that, because Capt B said she was an agent of the government, the military judge should impose the sentence she "promised."

First, as the appropriate experts reflect, we are not dealing with forfeiture of issues in this case, but knowing, affirmative, and tactical waivers. *See United States v. Pagel,* 40 M.J. 771 (A.F.C.M.R. 1994); *United States v. Spears,* 39 M.J. 823 (A.F.C.M.R. 1994). It is patently evident that trial defense counsel investigated and considered all issues potentially surrounding appellant's conversations with Capt B and made a professional tactical assessment that they were not viable, and that a negotiated guilty plea was appellant's best course of action. *See United States v. Duffey,* 37 M.J. 511, 516 (A.F.C.M.R. 1993). Second, with regards to the "equities of this case," we see no egregious, outrageous conduct by the Government which violates the Fifth Amendment or otherwise might give rise to an exercise of this Court's supervisory powers to dispel any overriding appearance that a miscarriage of justice occurred.

The main evil trait of the "betraying defense counsel strawman" constructed by the defense is that appellant was promised confidentiality when there was no intent to keep the promise. First, appellant conveniently ignores the fact that there was genuine concern for his life.

Second, there simply is not a scintilla of evidence that the government was told or made use of anything appellant may have told Capt B, if he, in fact, told her anything. Third, there was no promise made by Capt B regarding appellant's sentence.

Chaplain F referenced the many qualifiers in Capt B's responses. Appellant's own testimony reveals that Capt B did no more than render a preliminary estimate of what maximum punishment appellant might be facing for the offenses he discussed with her. To stretch it further is hyperbole. Article 66(c), UCMJ. Capt B's interaction with appellant had no impact on his trial, his Sixth Amendment right to effective assistance of counsel, or his ability to prepare a defense as guaranteed by the Fifth Amendment. *See Nix v. Whiteside*, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986). This record contains nothing which would justify ignoring the affirmative tactical waivers which permeate it.

D. Sentence Severity

We specificially note the fact that this case presents a textbook example of the type of convening authority involvement and assessment envisioned by Congress in Article 60, UCMJ. The convening authority was fully apprised of the circumstances surrounding appellant's surrender, including Capt B's involvement, and the central defense thrust that appellant only was seeking help. The convening authority gave appellant's parents a personal audience to express their concerns about appellant's case. Further, the record is replete with the convening authority's notations and underlining, especially as it related to appellant's mental health status, his request for treatment, the evaluations he received, and the final medical assessment.

The psychological assessment of appellant was that he had a personality disorder with narcissistic traits, including manipulation. He was not suicidal, but was reacting to

the stressors of his marital problems, which were aggravated by his intense need to control his marriage. This essentially was the diagnosis of Dr. H, who saw appellant on 15 January 1992, suggested a course of outpatient treatment for appellant, and advised appellant's superiors that appellant's failure to comply may lead to a recommendation of administrative separation from the Air Force. Dr. G testified that, even in hindsight, the initial assessment of appellant by Dr. H, prior to the offenses, was not inaccurate, although they did not expect appellant to commit the acts he committed. Contrary to appellant's belief and desires, Dr. G testified appellant was not in need of in-patient treatment, although he needed continued mental health treatment.

The record establishes that appellant received psychological medical attention each time he sought it, including the pretrial mental evaluation Capt B told him he would receive. The underlying flaw of appellant's position is that he was unwilling to accept or view as "help" anything other than in-patient treatment at a certain specific hospital, *i.e.*, Wilford Hall, and anything short of that was viewed as not addressing his needs.

After reading this record, we are left with the firm conviction that appellant sought to gain marital harmony by calculatingly committing very serious offenses and putatively holding his own life hostage to control the actions of others. The Air Force, and appellant, is quite fortunate that he did not incite a violent response by either Sergeant H or local authorities. Therefore, after giving full consideration to all factors, including appellant, the nature and seriousness of the offenses, and the character of appellant's service, we find appellant did not receive an inappropriate sentence. *United States v. Healy*, 26 M.J. 394 (C.M.A. 1988); *United States v. Snelling*, 14 M.J. 267 (C.M.A. 1982); Arcticle 66 (c), UCMJ.

III. FINAL OBSERVATIONS

This Court is troubled by how the issue concerning appellant and Capt B was handled at trial. Yes, it was neatly and firmly waived as a legal matter, but the red flags were flying high and should have been heeded, especially when civilian trial defense counsel commented to the military judge that:

> [W]hat happens with Captain [B] professionally after this case really is irrelevant. . . . I think that what Captain B did is reprehensible. . . . I'm one of Special Counsel to the Oregon State Bar on Ethics Issues, and I'd like to think I know enough about ethics to recognize that you don't tell somebody you'll represent them and that what you say is going to be confidential while you're actually working for the government.

Although referred to as collateral to the trial and conceded as having no place in the court, the trial defense counsel purposely inserted Capt B's involvement and the role of the defense counsel into the sentencing proceedings. In effect. Capt B and—to a certain extent as argued by civilian appellant defense counsel, the Air Force's defense bar—was case in a negative light in this case. One very troublesome aspect is that the castigation of Capt B may well have been inappropriate. It is unfortunate that this record leaves this cloud over her.

The court-martial is only the beginning of the process, not end end—and even guilty pleas do not change this reality. *See e.g., United States v. Caylor,* 40 M.J. 786 (A.F.C.M.R. 1994). Military judges know it, and staff judge advocates should know it. Most troubling is that the appellant seed planted during the trial was not subtle. The military judge specifically allowed counsel to pursue the issue as evidence which might mitigate the sentence imposed. Given the tenor of counsel's remarks above,

castigating Capt B, their plain appellate potential, was obvious. A post-trial Article 39(a), UCMJ, session convened by the military judge or convening authority would have developed the pertinent facts on the record for appropriate post-trial use. Fortunately, for this Court's purposes, the affirmative waivers are plain and evident.

It may be that because the prime concern of appellant's and Capt B's superiors *et al* was saving appellant from harming himself and, as a result of the plain waivers by the defense, the potential ramifications on appeal were not evident. We trust that by now the department has caused specific training and guidance to be provided our defense bar in this sensitive area. As this case vividly reflects, complex questions concerning the attorney-client privilege and client confidences may arise when a client is a fugitive or presents a possible danger to him or herself. *See generally Matter of Nackson,* 114 N.J. 527, 555 A.2d 1101 (N.J. 1989); *Commonwealth v. Maguigan,* 511 Pa. 112, 511 A.2d 1327 (Pa 1986).

The findings and sentence are correct in law and fact, Article 66(c), UCMJ, and, on the basis of the entire record, are

AFFIRMED

Judges PEARSON and SCHREIER concur.

OFFICIAL

[USAF SEAL]

/s Alvin J. Stribling
ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator

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